

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

IN RE: WESTERN STATES
WHOLESALE NATURAL GAS
ANTITRUST LITIGATION

MDL 1566
2:03-CV-01431-PMP-PAL
BASE FILE

ARANDELL CORP., et al.,
Plaintiffs,

2:07-CV-01019-PMP-PAL

v.

XCEL ENERGY, INC., et al.,
Defendants.

ORDER RE: DEFENDANT'S MOTION
TO DISMISS (Doc. #929)

Presently before this Court is Defendant Dynegy Illinois Inc.'s Motion to Dismiss (Doc. #929).¹ Plaintiffs filed an Opposition (Doc. #1245) and supporting exhibits (Doc. #1089, #1092, #1097, #1131, #1180, #1246, #1498). Plaintiffs also filed a supplement to their opposition (Doc. #1271). Defendant Dynegy Illinois Inc. filed a Reply (Doc. #1281) with supporting declarations (Doc. #1282, #1284).

Also before the Court is Plaintiffs' Motion to Supplement Record in Response to Dynegy Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction (Doc. #1495). Defendant Dynegy Illinois Inc. filed an Opposition (Doc. #1507). Plaintiffs filed a Reply (Doc. #1516).

///

///

¹ Document numbers refer to the base file, 2:03-CV-01431-PMP-PAL, unless otherwise noted.

1 **I. BACKGROUND**

2 **A. Procedural Background**

3 This case is one of many in consolidated Multidistrict Litigation arising out of the
4 energy crisis of 2000-2001. Plaintiffs originally filed this action in the Circuit Court, Dane
5 County, Wisconsin. (Notice of Removal [Doc. #2 in 2:07-CV-01019-PMP-PAL], Compl.)
6 Defendants removed the case to the United States District Court for the District of
7 Wisconsin. (Id.) The Judicial Panel on Multidistrict Litigation entered a Transfer Order
8 pursuant to 28 U.S.C. § 1407 centralizing the foregoing action in this Court for coordinated
9 or consolidated pretrial proceedings.

10 Plaintiffs Arandell Corporation, Merrick's, Inc., Safety-Kleen Systems, Inc.,
11 Sargento Foods, Inc., and Ladish Co., Inc. are Wisconsin corporations. (Corrected Second
12 Am. Compl. [Doc. #190 in 2:07-CV-01019-PMP-PAL]² at 5-6.) According to the
13 Corrected Second Amended Complaint ("SAC"), Defendants are natural gas companies that
14 buy, sell, transport, and store natural gas, including their own and their affiliates'
15 production, in the United States and in the State of Wisconsin. (Id. at 6-51.) In this
16 litigation, Plaintiffs allege Defendants conspired to engage in anti-competitive activities
17 with the intent to manipulate and artificially increase the price of natural gas for consumers.
18 (Id.) Specifically, Plaintiffs allege Defendants, directly and through their affiliates,
19 conspired to manipulate the natural gas market by knowingly delivering false reports
20 concerning trade information to trade indices and engaging in wash trades, in violation of
21 Wisconsin Statutes chapter 133. (Id.)

22 The SAC asserts two causes of action. Count one arises under Wisconsin
23 Statutes § 133.14, which voids contracts to which an antitrust conspirator is a party and
24

25 ² Plaintiffs' Second Amended Complaint is located at docket number 847 in the base file.
26 Plaintiffs filed the Corrected Second Amended Complaint only in the individual case file.

1 allows recovery of payments made pursuant to such a contract. (Id. at 54-56.) Count two
2 seeks trebled actual damages under Wisconsin Statutes § 133.18 for Defendants' alleged
3 antitrust violations. (Id. at 56-57.)

4 The SAC's allegations are directed generally at two types of Defendants: the
5 natural gas companies that actually engaged in natural gas sales and the related reporting of
6 allegedly manipulated gas prices to the trade indices, and those companies' parent
7 corporations. The SAC does not allege the parent company Defendants themselves engaged
8 in natural gas trading and price reporting. Rather, the SAC alleges these Defendants are the
9 parent companies of subsidiaries which engage in such activity generally, and which also
10 made natural gas sales in Wisconsin during the relevant time period.

11 Plaintiffs seek to establish personal jurisdiction over the parent company
12 Defendants based on their out-of-forum activities directed at Wisconsin along with their
13 subsidiaries' and affiliates' contacts within Wisconsin. According to the SAC, the parent
14 company Defendants dominated and controlled their respective subsidiaries and the parent
15 company Defendants "entered into a combination and conspiracy . . . which tended to
16 prevent full and free competition in the trading and sale of natural gas, or which tended to
17 advance or control the market prices of natural gas." (Id. at 6-7, 9, 14-15, 18-19, 23, 26-27,
18 30-31, 35-36.) Plaintiffs allege the parent company Defendants intended their actions to
19 have a direct, substantial, and foreseeable effect on commerce in the State of Wisconsin.
20 (Id. at 7, 10, 15, 19, 23-24, 27, 31, 36.) According to the SAC, the parent company
21 Defendants "made strategic marketing policies and decisions concerning natural gas and the
22 reporting of natural gas trade information to reporting firms for use in the calculation of
23 natural gas price indices that affected the market prices of natural gas, and those policies
24 and decisions were implemented on an operational level by affiliates . . . in the United
25 States and in Wisconsin." (Id. at 8, 10, 15, 19, 24, 27-28, 32, 36.)

26 ///

1 Defendant Dynegy Illinois Inc. (“Dynegy”) now moves to dismiss, arguing this
2 Court lacks personal jurisdiction over Dynegy. According to Dynegy, it conducts no
3 business in Wisconsin and has no other contacts supporting general or specific jurisdiction.
4 Dynegy also argues it cannot be subject to jurisdiction in Wisconsin based on its
5 subsidiary’s contacts with the forum because its subsidiary is not its agent or alter ego, and
6 Wisconsin would not support the conspiracy theory of jurisdiction. Dynegy thus argues
7 personal jurisdiction does not exist under the Wisconsin long-arm statute, and even if it did,
8 exercising personal jurisdiction in this case would violate constitutional due process
9 requirements.

10 Plaintiffs respond that Dynegy’s subsidiary has submitted to jurisdiction in
11 Wisconsin and Dynegy is subject to personal jurisdiction based on agency and alter ego
12 principles based on its subsidiary’s contacts. Additionally, Plaintiffs argue that because
13 Wisconsin’s antitrust statutes contemplate imposing liability on an antitrust conspirator who
14 performs acts outside of Wisconsin that have an impact in Wisconsin, the Court has
15 personal jurisdiction over Dynegy under Wisconsin’s long-arm statute.

16 **B. Facts Related to Personal Jurisdiction**

17 Dynegy is an Illinois corporation with its principal place of business in Texas.
18 (Mot. to Dismiss (Doc. #929), Decl. of Amy E. Jolley at 2.) Dynegy formerly was known
19 as Dynegy Inc. until it changed to its current name in April 2007. (Id.) Dynegy is a holding
20 company which does not itself engage in business operations. (Id.) Rather, it owns direct
21 and indirect subsidiaries which operate in various sectors of the energy industry. (Id.)

22 Dynegy has never been qualified to do business in Wisconsin, has never paid
23 taxes in Wisconsin, and has never itself engaged in natural gas trading, marketing,
24 production, sales, or transportation in the state. (Id.) Dynegy has never reported natural gas
25 price or volume data to any price reporting index anywhere, including Wisconsin. (Id. at 3.)
26 Dynegy does not have an office, mailing address, telephone number, bank account,

1 employees, or property in Wisconsin. (Id. at 2.)

2 Dynege indirectly wholly owns Dynege Marketing and Trade (“DMT”), a
3 Colorado partnership. (Decl. of William E. Fischer (Doc. #1246) [“Fischer Decl.”], Ex. 1 at
4 27, 39.) DMT’s current partners are indirect wholly owned subsidiaries of Dynege. (Id. at
5 38, 49-50.) During the relevant time period, DMT engaged in natural gas trading and price
6 reporting activity. (Fischer Decl., Ex. 5 at DYN-ARAN000486.)

7 Dynege and DMT share overlapping officers. (Fischer Decl., Ex. 1 at 10.) The
8 personnel who perform functions for Dynege are employed by DMT, including Dynege’s
9 officers and directors. (Id. at 34.) DMT provides accounting, legal, tax, human resources,
10 and information technology services to Dynege and to other Dynege subsidiaries. (Id. at 36,
11 110-11.) Dynege and DMT also share offices. (Id. at 33.) Employees are not segregated in
12 the offices based on the legal entity for which they are performing services. (Id. at 109.)
13 DMT used to charge the various business segments for these services but ceased doing so in
14 2006 when Dynege focused on one industry, power generation. (Id. at 111-12.)

15 In terms of financial dealings between DMT and Dynege, DMT’s financial data
16 is included in consolidated reporting for Dynege. (Id. at 98.) Dynege issued two
17 guarantees to third parties on DMT’s behalf, neither of which related to DMT’s activities in
18 Wisconsin. (Id. at 27; Fischer Decl., Ex. 2, attachs. 7, 8.) The guarantees were designed to
19 induce the third parties to do business with DMT. (Fischer Decl., Ex. 2, attachs. 7, 8.)
20 DMT typically used its own cash to fund its operations as an ongoing commercial
21 operational entity. (Fischer Decl., Ex. 1 at 101.) To the extent DMT had excess cash, it
22 would issue a distribution to its general partners or send that money up the corporate chain
23 to Dynege Holdings, Inc. (Id. at 101, 106.) Dynege Holdings, Inc. is the primary holder of
24 external debt for Dynege-related entities and is subject to certain limitations in credit
25 facility agreements with third party lenders. (Id. at 107.) DMT employees in the treasury
26 group perform a daily cash sweep of each subsidiary, including DMT, and deposit it into a

1 consolidated account where it is invested on a daily basis. (Id. at 108.)

2 DMT's general partners do not dispute personal jurisdiction in Wisconsin in this
3 action.³ DMT sold millions of dollars worth of natural gas to entities with Wisconsin
4 addresses during the 2000 to 2002 time frame. For example, Wisconsin-based Integrys
5 Energy Services ("Integrys") purchased millions of dollars worth of natural gas from DMT
6 from 2000 to 2002. (Decl. of Sandy Roder (Doc. #1092); Notice of Filing of Docs. Under
7 Seal (Doc. #1184) at INTSUB000004-5.) DMT also had a long term natural gas supply
8 agreement with Wisconsin Gas LLC pursuant to which Wisconsin Gas LLC purchased
9 millions of dollars worth of natural gas from 2000 to 2002. (Decl. of William E. Fischer
10 (Doc. #1097), Second Decl. of James H. Voss at 2 & attach. 2.)

11 Wisconsin Public Service Corporation ("WPSC") also purchased over a million
12 dollars worth of natural gas from DMT between 2000 and 2002. (Notice of Filing of
13 Revised Decls. of Kristie J. Wiegand and Julie A. Baumgart (Doc. #1131), Decl. of Kristie
14 J. Wiegand at 3; Notice of Filing of Docs. Under Seal (Doc. #1180) at
15 WPSSUB000001-38.) In 1997, WPSC entered into a long term natural gas supply
16 agreement with a company called Natural Gas Clearinghouse. (Notice of Filing of Docs.
17 Under Seal (Doc. #1180) at WPSSUB000039-46.) In 1998, Natural Gas Clearinghouse
18 sent a letter to WPSC announcing that it had changed its name to "Dynergy." (Id. at
19 WPSSUB000047.) An undated letter on Dynergy, Inc. letterhead also announced the name

21 ³ Dynergy suggests Plaintiffs have not sued DMT, but instead sued only DMT's partners,
22 Dynergy GP, Inc. and DMT Holding LP. Plaintiffs' Corrected Second Amended Complaint asserts
23 claims against the Dynergy Defendants, described as Dynergy, Inc. and Dynergy GP Inc. DMT Holding
24 LP (d/b/a Dynergy Marketing and Trade). (Corrected Second Am. Compl. (Doc. #190 in 2:07-CV-
25 01019-PMP-PAL) at 38.) According to filings with the Colorado Secretary of State for statement of
26 a trade name, Dynergy Marketing and Trade is the trade name for the "true name" of "Dynergy GP Inc.
DMT Holding LP." (Fischer Decl., Ex. 2, attachs. 2, 3.) Dynergy GP Inc. and DMT G.P., LLC
(successor to DMT Holdings, LP) filed Answers in this action admitting they are the general partners
of DMT and that DMT conducted business in Wisconsin during the relevant time period, defined as
January 1, 2000 through October 31, 2002. (Answer (Doc. #930) at 9; Answer (Doc. #931) at 9.)

1 change. (Id. at WPSSUB000048.) In 1999, WPSC entered into a net-out agreement with
2 Dynegey. (Id. at WPSSUB000049-50.) Dynegey sent back to WPSC the executed original
3 copy of the agreement under Dynegey, Inc. letterhead. (Id. at WPSSUB000051.) In May
4 2000, the net-out agreement was changed to reflect DMT as the counterparty rather than
5 Dynegey. (Id. at WPSSUB000054-58.) A May 30, 2000 letter on Dynegey, Inc. letterhead
6 stated that “our records show that we sold natural gas to you in the following states: IL, LA,
7 MI, WI.” (Id. at WPSSUB000059.) WPSC sent payment for the natural gas sales to DMT.
8 (Fischer Decl., Ex. 1 at 215.)

9 In filings with the Securities and Exchange Commission (“SEC”), Dynegey
10 described itself as “a leading provider of energy and communications solutions to customers
11 in North America, the United Kingdom and Continental Europe.” (Fischer Decl., Ex. 5 at
12 DYN-ARAN000486.) Dynegey stated it is “a holding company that principally conducts all
13 of its business through its subsidiaries.” (Id. at DYN-ARAN000582.) Dynegey set forth its
14 business in four business segments, with DMT being one of them. (Id. at
15 DYN-ARAN000574.) In a 2001 SEC filing, Dynegey stated that it “sells natural gas under
16 sales agreements that have varying terms and conditions intended to match seasonal and
17 other changes in demand.” (Fischer Decl., Ex. 6 at DYN-ARAN00611.)

18 In its SEC filings, Dynegey stated that it was subject to various risks including
19 commodity price variability related to its marketing and trading businesses. (Fischer Decl.,
20 Ex. 5 at DYN-ARAN000486.) Dynegey managed these and other risks through various risk
21 control structures. (Fischer Decl., Ex. 6 at DYN-ARAN000653.) An overview of
22 Dynegey’s risk management structure in a 2001 SEC filing placed at the top of this structure
23 the Dynegey board of directors, which had “[u]ltimate responsibility for ensuring that risks
24 are appropriately identified and managed.” (Id. at DYN-ARAN000654.) The board was
25 solely responsible for approving the risk policy, and it delegated that authority to the Audit
26 Committee of Dynegey’s board. (Id.) The Audit Committee performed its tasks primarily

1 through two committees: the Audit and Compliance Committee, which was responsible for
2 planning and executing internal financial and operational audits, and the Executive Risk
3 Committee, which set limits for investment, commodity, and financial risks. (Id.) The
4 Executive Risk Committee was comprised of Dynegy's Chief Executive Officer, Chief
5 Operating Officer, Chief Financial Officer, and Chief Risk Officer. (Id.)

6 Dynegy also had a Risk Committee which reviewed activities of existing
7 businesses, new businesses and products, divisional market risk limits, business unit market
8 risk limits, and currency and interest rate risk limits. (Id. at DYN-ARAN000655.) Dynegy
9 placed limits on a segment and business unit basis. (Id.) Business unit managers then
10 allocated that business unit's limits among individual traders or desks. (Id.) The Risk
11 Committee reported to the Executive Risk Committee. (Id.) The Risk Committee was
12 comprised of Dynegy officers and various business unit officers. (Decl. of William E.
13 Fischer (Doc. #1498) ["Supp. Fischer Decl."], Ex. A at DYN-ARAN017592.)

14 Dynegy also had a Chief Risk Officer who headed an enterprise-wide risk control
15 department. (Fischer Decl., Ex. 6 at DYN-ARAN000655.) This department assured
16 adherence to the risk policy, monitored risk limits on a daily basis, and reported its results to
17 the appropriate risk committees. (Id.; Supp. Fischer Decl., Ex. A at DYN-ARAN017594,
18 DYN-ARAN017638.) The department also reported limit violations to the appropriate
19 board and management committees as well as to business unit managers. (Fischer Decl.,
20 Ex. 6 at DYN-ARAN000655.) The department verified compliance through daily
21 monitoring. (Supp. Fischer Decl., Ex. A at DYN-ARAN017638.) The department then
22 produced its own daily Consolidated Report. (Id. at DYN-ARAN017639.) Limit violations
23 were reported immediately to the Chief Risk Officer. (Id.)

24 The business units operated within the trading limits. (Id. at
25 DYN-ARAN017598.) Dynegy's Risk Management and Control Policy from 1998 ("1998
26 Policy") stated that "[i]t is the effectiveness of the business units in developing,

1 implementing, measuring and adjusting risk management strategies that dictates the
2 profitability of the unit.” (Id. at DYN-ARAN017599.) The 1998 Policy gave business unit
3 heads the authority to set and review individual trader limits. (Id.) “The heads of the
4 business units are responsible for the risks undertaken within the confines of the risk control
5 framework.” (Id.; see also id. at DYN-ARAN017607 (“The Business Unit Leaders are
6 responsible for the risks undertaken within the limits that have been authorized.”).)
7 Business unit leaders reviewed daily results and were “responsible for explanations of limit
8 violations. Limits violations will require the next tiered level to produce a written response
9 accepting the risk, otherwise the position which is violated, will be liquidated.” (Id. at
10 DYN-ARAN019603.) Business units prepared a Daily Position Report and submitted it to
11 the risk control department. (Id. at DYN-ARAN017626.)

12 Under the 1998 Policy, the “Dynergy Board grant[ed] authorization, subject to the
13 approved transaction limits, to negotiate, enter into and execute, for and on behalf of the
14 Company, any and all contracts, agreements or other instruments in writing for or relating to
15 the purchase, sale, transmission or capacity acquisition and the purchase and sale of:
16 Natural Gas” (Id. at DYN-ARAN017598; see also id. at DYN-ARAN017601 (“The
17 Risk Committee grants trading authorization to Dynergy traders.”).) The 1998 Policy
18 included a “Trader Authorization Form” which stated that the individual trader “has been
19 authorized to act as a trader on behalf of Dynergy Inc., subject to all limitations and
20 qualifications” set forth in the 1998 Policy. (Id. at DYN-ARAN017612.) All trading
21 personnel had to acknowledge acceptance of the policy and violations could result in
22 discipline, including termination. (Id. at DYN-ARAN017589.)

23 In July 2002, Dynergy approved a Risk Policy Statement (“2002 Policy
24 Statement”). (Supp. Fischer Decl., Ex. D.) Under the 2002 Policy Statement, the Executive
25 Risk Committee was responsible for determining overall risk exposure, including
26 monitoring markets and business risks and allocating risk capital among business units. (Id.

1 at DYN-ARAN017744.) The Executive Risk Committee consisted of Dynegy and
2 subsidiary officers, including DMT's president. (Id.) The Executive Risk Committee was
3 to meet at least quarterly. (Id. at DYN-ARAN017745.) Business units were responsible for
4 effectuating daily reporting to the risk control department. (Id.)

5 Under the 2002 Policy Statement, the Risk Committee had oversight
6 responsibility for market risk exposure, risk management, and trading activities. (Id. at
7 DYN-ARAN017746.) The Risk Committee was comprised of Dynegy officers and
8 subsidiary officers, including DMT's president. (Id.) The Risk Committee met twice
9 monthly. (Id.)

10 The Dynegy board of directors was responsible for appointing a Chief Risk
11 Officer who reported to the Dynegy Board's Audit Committee. (Id. at
12 DYN-ARAN017747.) The Chief Risk Officer monitored the risk tolerance standards,
13 reported to the Audit Committee, set appropriate limits, assured compliance with the policy,
14 performed independent risk analyses, performed independent risk and performance
15 measurements, and communicated daily results to the Executive Risk Committee. (Id.)
16 Like the 1998 Policy, the 2002 Policy Statement required daily reporting of certain risk
17 management metrics. (Id. at DYN-ARAN017754-55.)

18 Under the 2002 Policy Statement, Dynegy "grant[ed] authorization, subject to the
19 approved risk exposure and transaction limits, to negotiate, enter into and execute, for and
20 on behalf of the Company, any and all contracts, agreements or other instruments in writing
21 for or relating to the purchase, sale, transmission or capacity acquisition and the purchase
22 and sale of: Natural Gas" (Id. at DYN-ARAN017750.) The 2002 Policy Statement
23 required personnel with transaction authority to execute a Letter of Authorization "to reflect
24 a written understanding of granted risk exposure as authorized under the guidelines of the
25 Risk Policy Statement." (Id. at DYN-ARAN017758.)

26 ///

1 In 2002, DMT entered into a settlement with the Commodity Futures Trading
2 Commission (“CFTC”) to settle charges that DMT violated the Commodity Exchange Act.
3 (Fischer Decl., Ex. 2, attach. 4.) According to the CFTC, DMT submitted fictitious price
4 reports to price reporting firms. (Id. at 2.) Pursuant to the settlement, DMT agreed to cease
5 and desist from further violations, and agreed to pay a \$5 million penalty in conjunction
6 with an affiliated entity. (Id. at 6.) DMT also agreed to cooperate with the CFTC’s
7 investigation and agreed not to publicly deny the CFTC’s findings. (Id. at 7.)

8 In October 2002, Dynegy announced that it had dismissed six employees and
9 would discipline seven others for violations of company policy relating to inaccurate price
10 reporting to price indices. (Fischer Decl., Ex. 8.) One DMT employee was indicted in
11 federal court in Texas on charges of conspiracy, false reporting, and wire fraud. (Fischer
12 Decl., Ex. 2, attachs. 5, 6.) In October 2002, a press release on Dynegy, Inc. letterhead
13 announced it was exiting the marketing and trading business. (Fischer Decl., Ex. 7.) DMT
14 thereafter ceased natural gas trading activities and currently purchases natural gas only to
15 run operations. (Fischer Decl., Ex. 1 at 144.)

16 The parties now dispute the significance of these contacts under the Wisconsin
17 long-arm statute. The parties also dispute whether this Court’s exercise of personal
18 jurisdiction over Dynegy would violate constitutional due process requirements.

19 **II. MOTION TO SUPPLEMENT RECORD**

20 Plaintiffs move to supplement the record to include exhibits produced by Dynegy
21 as a result of this Court granting Plaintiffs’ motion to compel further production of personal
22 jurisdiction discovery materials from Dynegy. Plaintiffs argue that because these
23 documents were not available during briefing on the motion to dismiss, Plaintiffs should be
24 permitted to supplement the record. Dynegy responds that Plaintiffs unduly delayed their
25 request to supplement the record, as Plaintiffs did not move to supplement the record until
26 three months after Dynegy produced the documents. Dynegy also argues the documents

1 present nothing new because Plaintiffs already argued Dynegy exercised day-to-day control
2 over DMT through risk control procedures. Dynegy contends the supplemental materials
3 show Dynegy was not involved in DMT's day-to-day affairs as Plaintiffs claim.

4 Alternatively, Dynegy requests additional briefing for Dynegy to address the merits of
5 Plaintiffs' supplemental factual argument.

6 The Court will grant Plaintiffs' motion to supplement the record. The Court
7 granted Plaintiffs' motion to compel and Plaintiffs should be given the opportunity to
8 present the produced evidence. Although Plaintiffs delayed in filing the supplement,
9 Dynegy has not established prejudice as a result. Dynegy contends the documents add
10 nothing new and presents responsive arguments in its opposition to the motion to
11 supplement. The Court will not grant additional briefing.

12 **III. PERSONAL JURISDICTION**

13 "When a defendant moves to dismiss for lack of personal jurisdiction, the
14 plaintiff bears the burden of demonstrating that the court has jurisdiction over the
15 defendant." Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1154 (9th Cir. 2006). To meet this
16 burden, a plaintiff must demonstrate that personal jurisdiction over a defendant is (1)
17 permitted under the applicable state's long-arm statute and (2) that the exercise of
18 jurisdiction does not violate federal due process. Id. The Court must analyze whether
19 personal jurisdiction exists over each defendant separately. Harris Rutsky & Co. Ins.
20 Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1130 (9th Cir. 2003).

21 Where the issue is before the Court on a motion to dismiss based on affidavits
22 and discovery materials without an evidentiary hearing, the plaintiff must make "a prima
23 facie showing of facts supporting jurisdiction through its pleadings and affidavits to avoid
24 dismissal." Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114,
25 1119 (9th Cir. 2002). The Court accepts as true any uncontroverted allegations in the
26 complaint and resolves any conflicts between the facts contained in the parties' evidence in

1 the plaintiff's favor. Id. However, for personal jurisdiction purposes, a court "may not
2 assume the truth of allegations in a pleading which are contradicted by affidavit."

3 Alexander v. Circus Circus Enters., Inc., 972 F.2d 261, 262 (9th Cir. 1992) (quotation
4 omitted).

5 In diversity cases such as this, "a federal court applies the personal jurisdiction
6 rules of the forum state provided the exercise of jurisdiction comports with due process."
7 Scott v. Breeland, 792 F.2d 925, 927 (9th Cir. 1986). However, "federal law is controlling
8 on the issue of due process under the United States Constitution." Data Disc, Inc. v. Sys.
9 Tech. Assoc., Inc., 557 F.2d 1280, 1286 n.3 (9th Cir. 1977); see also Dole Food Co., Inc. v.
10 Watts, 303 F.3d 1104, 1110 (9th Cir. 2002). Therefore, the Court will apply law from the
11 United States Court of Appeals for the Ninth Circuit in deciding whether jurisdiction is
12 appropriate under the Due Process Clause. See In re Korean Air Lines Disaster of Sept. 1,
13 1983, 829 F.2d 1171, 1174 (D.C. Cir. 1987) (concluding that "the transferee court [should]
14 be free to decide a federal claim in the manner it views as correct without deferring to the
15 interpretation of the transferor circuit"); Menowitz v. Brown, 991 F.2d 36, 40 (2d Cir.
16 1993) (holding that "a transferee federal court should apply its interpretations of federal
17 law, not the constructions of federal law of the transferor circuit").

18 To satisfy federal due process standards, a nonresident defendant must have
19 "minimum contacts" with the forum state so that the assertion of jurisdiction does not
20 offend traditional notions of fair play and substantial justice. Pebble Beach Co., 453 F.3d at
21 1155 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 315 (1945)). A federal district
22 court may exercise either general or specific personal jurisdiction. See Helicopteros
23 Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-15 (1984).

24 To establish general personal jurisdiction, the plaintiff must demonstrate the
25 defendant has sufficient contacts to "constitute the kind of continuous and systematic
26 general business contacts that 'approximate physical presence.'" Glencore Grain, 284 F.3d

1 at 1124 (quoting Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th
2 Cir. 2000), modified, Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433
3 F.3d 1199, 1207 (9th Cir. 2006)). Courts consider such factors as whether the defendant
4 makes sales, solicits or engages in business in the state, serves the state's markets,
5 designates an agent for service of process, holds a license, or is incorporated there.
6 Bancroft, 223 F.3d at 1086. "[A] defendant whose contacts are substantial, continuous, and
7 systematic is subject to a court's general jurisdiction even if the suit concerns matters not
8 arising out of his contacts with the forum." Glencore Grain, 284 F.3d at 1123 (citing
9 Helicopteros, 466 U.S. at 415 n.9).

10 A nonresident defendant's contacts with the forum state may permit the exercise
11 of specific jurisdiction if: (1) the defendant has performed some act or transaction within
12 the forum or purposefully availed himself of the privileges of conducting activities within
13 the forum, (2) the plaintiff's claim arises out of or results from the defendant's forum-
14 related activities, and (3) the exercise of jurisdiction over the defendant is reasonable.
15 Pebble Beach Co., 453 F.3d at 1155-56. "If any of the three requirements is not satisfied,
16 jurisdiction in the forum would deprive the defendant of due process of law." Omeluk v.
17 Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 270 (9th Cir. 1995).

18 Under the first prong of the "minimum contacts test," the plaintiff must establish
19 either that the defendant "(1) purposefully availed himself of the privilege of conducting his
20 activities in the forum, or (2) purposefully directed his activities toward the forum." Pebble
21 Beach Co., 453 F.3d at 1155. "Evidence of availment is typically action taking place in the
22 forum that invokes the benefits and protections of the laws in the forum." Id. Evidence of
23 direction usually consists of conduct taking place outside the forum that the defendant
24 directs at the forum. Id. at 1155-56.

25 The purposeful direction aspect of the first prong is satisfied when a foreign act is
26 both aimed at and has effect in the forum. Id. In other words, the defendant "must have (1)

1 committed an intentional act, which was (2) expressly aimed at the forum state, and (3)
2 caused harm, the brunt of which is suffered and which the defendant knows is likely to be
3 suffered in the forum state.” Id. To satisfy the third element of this test, the plaintiff must
4 establish the defendant’s conduct was “expressly aimed” at the forum; a “mere foreseeable
5 effect” in the forum state is insufficient. Id. The “express aiming” requirement is satisfied
6 when the defendant is alleged to have engaged in wrongful conduct “individually targeting
7 a known forum resident.” Bancroft, 223 F.3d at 1087.

8 The second prong of the specific jurisdiction test requiring that the contacts
9 constituting purposeful availment or purposeful direction give rise to the current action is
10 measured in terms of “but for” causation. Id. at 1088. “If the plaintiff establishes both
11 prongs one and two, the defendant must come forward with a ‘compelling case’ that the
12 exercise of jurisdiction would not be reasonable.” Boschetto v. Hansing, 539 F.3d 1011,
13 1016 (9th Cir. 2008) (quotation omitted).

14 A subsidiary’s contacts may be imputed to its parent for personal jurisdiction
15 purposes where the subsidiary is the parent’s general agent in the forum. Harris Rutsky &
16 Co. Ins. Servs., Inc., 328 F.3d at 1134. A subsidiary is its parent’s agent for purposes of
17 attributing its forum-related contacts to the parent if the subsidiary “performs services that
18 are ‘sufficiently important to the foreign corporation that if it did not have a representative
19 to perform them, the corporation’s own officials would undertake to perform substantially
20 similar services.’” Doe, 248 F.3d at 928 (quoting Chan v. Society Expeditions, Inc., 39
21 F.3d 1398, 1405 (9th Cir. 1994)). The ultimate inquiry is whether the subsidiary’s presence
22 in the forum “substitutes” for its parent’s presence. Id. at 928-29 (quotation omitted).

23 Where the parent is merely a holding company, the subsidiary’s forum-related
24 contacts are not done as the parent’s agent because the holding company “could simply hold
25 another type of subsidiary” as an investment and thus the subsidiary conducts business not
26 as the parent’s agent but as its investment. Id. at 929. “Where, on the other hand, the

1 subsidiaries are created by the parent, for tax or corporate finance purposes, there is no
2 basis for distinguishing between the business of the parent and the business of the
3 subsidiaries.” Id. (quotation omitted). The inquiry as to whether a subsidiary is its parent’s
4 general agent in the forum is “a pragmatic one.” Gallagher v. Mazda Motor of Am., Inc.,
5 781 F. Supp. 1079, 1085 n.10 (E.D. Pa. 1992).

6 For example, where a Japanese parent company was engaged in the manufacture
7 of watches, its subsidiaries that acted as its sole sales agents in America were “almost by
8 definition . . . doing for their parent what their parent would otherwise have to do on its
9 own.” Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd., 508 F. Supp. 1322, 1342
10 (E.D.N.Y. 1981). The Bulova court thus attributed the subsidiaries’ contacts to the parent
11 company. Id.; see also Chan, 39 F.3d at 1405-06 (remanding to the district court for
12 additional findings of fact regarding agency where the German parent corporation owned
13 and operated cruise ships and its local subsidiary marketed cruises and chartered cruise
14 ships and sold the cruise ticket to the plaintiffs out of which the claims arose); Modesto City
15 Schs. v. Riso Kagaku Corp., 157 F. Supp. 2d 1128, 1135 (E.D. Cal. 2001) (holding
16 subsidiary was parent’s agent for personal jurisdiction purposes where subsidiary acted as
17 sole conduit for marketing and selling parent’s products in the United States).

18 In contrast, where the parent company owned a subsidiary mining company’s
19 stock but did not itself engage in the business of gold mining, imputing the subsidiary’s
20 forum contacts to the parent was not appropriate. Sonora Diamond Corp. v. Superior Court,
21 99 Cal. Rptr. 2d 824, 840-41 (Ct. App. 2000). As the Sonora Diamond court explained, had
22 the parent company owned “the rights to the gold and used Sonora Mining as the operating
23 and marketing entity,” then perhaps general jurisdiction over the parent company would be
24 appropriate because under those circumstances the parent company “could not reap the
25 benefits of its rights unless it or someone else removed and sold the ore.” Id. But where
26 the parent simply held the mining company as an investment, the subsidiary’s forum-related

1 contacts could not be imputed to the parent company. Id.

2 Likewise, in Doe, the Ninth Circuit concluded a foreign company's subsidiaries
3 were not its general agents in California because the plaintiffs presented no evidence that in
4 the absence of the California subsidiaries' involvement in petrochemical and chemical
5 operations, the parent would have conducted and controlled those operations. Doe, 248
6 F.3d at 929. The Court reached this conclusion even though the parent company issued
7 consolidated reporting, referred to a subsidiary in an annual report as its "US unit," and
8 stated that use of the subsidiary "would enable it to expand its marketing network and
9 produce higher value-added specialty products in the United States." Id.

10 Plaintiffs have established a prima facie case of personal jurisdiction over
11 Dynegy. Plaintiffs have presented evidence that Dynegy authorized DMT to act as its agent
12 for natural gas sales. The 1998 Policy and the 2002 Policy Statement each stated that
13 Dynegy's board of directors granted authorization to traders to negotiate, enter into, and
14 execute natural gas sales and purchases on Dynegy's behalf. The 1998 Policy contained a
15 "Trader Authorization Form" which stated that the individual trader "has been authorized to
16 act as a trader on behalf of Dynegy, Inc., subject to all limitations and qualifications" set
17 forth in the 1998 Policy. (Supp. Fischer Decl., Ex. A at DYN-ARAN017612 (emphasis
18 added).) Dynegy sent a letter to WPSC on its own letterhead to confirm that Dynegy made
19 sales to WPSC in several states, including Wisconsin. This letter is further evidence that
20 DMT engaged in natural gas sales in Wisconsin and elsewhere on Dynegy's behalf.
21 Dynegy's express authorization for DMT traders to make natural gas transactions on its
22 behalf is prima facie evidence that DMT's services, at least during the relevant period, were
23 sufficiently important to Dynegy that if it did not have a representative to perform them, it
24 would have done so itself.

25 While DMT's subsequent cessation of natural gas trading suggests the business
26 line was not sufficiently important to Dynegy that it would have performed the activity

1 without DMT's assistance, Plaintiffs need present only a prima facie case of personal
2 jurisdiction at this juncture. Dynegey's decision to compel each trader to acknowledge an
3 express grant of trading authorization on behalf of Dynegey, rather than on behalf of DMT,
4 suggests that at least during the relevant period, Dynegey considered natural gas trading
5 sufficiently important to its "organizational life" to require an explicitly authorized agent
6 to conduct the activity on its behalf. Bulova Watch Co., Inc., 508 F. Supp. at 1344. Having
7 granted DMT traders agency authority to conduct natural gas sales on Dynegey's behalf, its
8 agent's in-forum contacts are attributable to Dynegey. Dynegey does not dispute that if
9 DMT's contacts are attributable to Dynegey, that it is subject to personal jurisdiction in the
10 forum. DMT and its general partners have stipulated they are subject to general jurisdiction
11 in Wisconsin. (Fischer Decl., Ex. 1 at 26.) The Court therefore will deny Dynegey's motion
12 to dismiss for lack of personal jurisdiction.

13 **IV. CONCLUSION**


14 IT IS THEREFORE ORDERED that Dynegey Illinois Inc.'s Motion to Dismiss
15 (Doc. #929) is hereby DENIED.

16 IT IS FURTHER ORDERED that Plaintiffs' Motion to Supplement Record in
17 Response to Dynegey Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction (Doc.
18 #1495) is hereby GRANTED.

19 IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to File Under Seal
20 (Doc. #1496) is hereby DENIED as moot.

21 IT IS FURTHER ORDERED that Plaintiffs' Withdrawal of Motion for Leave to
22 File Under Seal (Doc. #1497) is hereby GRANTED.

23 DATED: March 9, 2009

24
25 
26 PHILIP M. PRO
United States District Judge